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ONE STEP FORWARD, TWO STEPS BACK

THE POLITICAL AND INSTITUTIONAL DYNAMICS BEHIND THE SUPREME COURT OF CANADA’S DECISIONS IN R. v. SPARROW, R v. VAN DER PEET AND DELGAMUUKU v. BRITISH COLUMBIA

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SOMMAIRE

Dans cet article, on émet l’hypothèse que la meilleure décision possible attendue par les plaidoiries autochtones de la Cour suprême du Canada, dans une cause reliée aux droits autochtones, est une décision qui évite de trancher sur le bien-fondé de la cause elle-même mais qui renforce la main mise des plaidoiries dans de futures négociations pour déterminer les droits en cause.

Si, après avoir obtenu une telle décision, le gouvernement n’entreprend pas des négociations sensées, il est peu probable que la Cour intervienne de manière positive en faveur des plaidoiries autochtones. Cette hypothèse est étudiée suite à deux décisions importantes de la Cour suprême du Canada en matière de droits autochtones, soit les causes R c. Sparrow et R c. Van der Peet. Dans cet article, on étudie également comment la décision de la Cour suprême du Canada dans la cause R c. Delgamuukw — cas de titre autochtone — correspond à la théorie.

INTRODUCTION

This paper seeks to provide some explanation for what appears to be a serious step back by the Supreme Court of Canada in the area of Aboriginal rights. While the decision in R v. Sparrow was seen as the high water mark of the Court’s recognition of Aboriginal rights, the subsequent decision in R v. Van der Peet appears to mark a severe retrenchment in the Court’s thinking. While the paper will provide some analysis of Van der Peet, and a discussion of what is wrong with the frozen rights approach to Aboriginal rights advanced in that case, the purpose of the paper is not simply to criticize the Court.

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1. For the purposes of this paper, the word “Aboriginal” will be capitalized. Capitalization of this word is not universal. While the Royal Commission on Aboriginal Peoples capitalizes the word, the Supreme Court does not. The author of this paper draws no conclusions from this fact, but prefers the approach taken by the Royal Commission.


The paper will suggest that the decision in *Van der Peet* is best understood as a reaction to the federal government's rejection of the Court's invitation to enter into substantive negotiations with Aboriginal people contained in *Sparrow*. In order to understand why the government's rejection had such an impact on the Court, the institutional limits to judicial review will be described and the dialogic process by which the legislature and the Court reach accommodations will be detailed. The paper suggests that the strength of any particular Court decision depends on the extent to which it is accepted by the legislature. In the area of Aboriginal rights, the Court cannot provide much support in the face of significant political opposition to the expansion of such rights. The paper concludes with a discussion of the Supreme Court of Canada's decision in *Delgamuukw v. British Columbia*.\(^4\)

**MOVING FORWARD – R. v. *SPARROW***

Canadian courts (and before them colonial courts in Canada) have attempted to map out the limits of Aboriginal rights since almost the beginning of contact between Aboriginal people and European society. There is not the time or place here to provide any sort of comprehensive outline or history of such cases. There is no question however that the enactment of the *Constitution Act, 1982*, fundamentally changed the way in which the Court approached the issue of Aboriginal rights. While Aboriginal rights cases post-1982 continued to refer to the touchstone cases of the past,\(^5\) the enactment of s. 35(1) of the *Constitution Act* provided the courts with a potentially radically new way of viewing Aboriginal rights.

Section 35(1) of the *Constitution Act* states:

> The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.\(^6\)

As with much else in the *Constitution Act, 1982*, the actual meaning of the key words of s. 35(1) left much room for interpretation. What for example was the significance of the term “existing”?\(^7\) and what did it mean to “recognize and affirm rights”? Does

\(^4\) S.C.C. File # 23799, judgement released December 11, 1997 (Supreme Court of Canada).


\(^6\) Section 35 goes on to state in subsection (2) that the term Aboriginal people refers to Indian, Inuit and Metis.

\(^7\) The word “existing” did not appear in the initial draft of s. 35(1). There is no question that the addition of the word was done to bring recalcitrant provinces on board. These provinces opposed the entrenchment of any declaration of Aboriginal rights due to a fear of what a court might do with the section. For those provinces, the meaning of the word ‘existing’ was clear, it froze those rights — whatever they might be — at the level they were as of the enactment of the Charter in 1982. (E. Mendes and P. Bendin, *The New Canadian Charter of Rights, International Law and Aboriginal Self-Determination: A Proposal for a New Direction* (Vancouver: 1983) at 32).

Had the provinces known that the Supreme Court of Canada would so quickly and completely reject the notion of “original intent” (in *Reference re s. 94 (2) of the Motor Vehicle Act* [1985] 2 S.C.R.)
the fact that s. 35(1) is outside of the Charter of Rights and Freedoms mean that government cannot rely on the justificatory standards of s. 1 of the Charter allowing otherwise unconstitutional actions of the government to be upheld by the Court in Aboriginal rights cases?

Section 35(1) generated much debate and discussion in legal and political circles. A constitutional conference, called under the terms of s. 35 in 1984, attempted to flesh out some of the section's concepts but failed to provide any further guidance. It was thus left to the courts, and the Supreme Court of Canada in particular, to determine the meaning of s. 35(1). This process began in earnest with the decision in R v. Sparrow.

Sparrow was a unanimous decision of the court, written by Chief Justice (at the time) Dickson and Justice La Forest. The case allowed the court, for the first time, to publicly reflect on the meaning of s. 35(1). Sparrow arose as a result of a dispute regarding the allowable fish catch for members of the Musqueam First Nation. Provincial regulations restricted the manner in which the Musqueam could fish for food for personal use. This restriction in methods of catching fish had an impact on the number of fish that could be caught.

The court began its analysis by examining the meaning of the word “existing” in s. 35. The court rejected the notion that “existing rights” meant rights currently in existence and being exercised as of the date of the proclamation of the Constitution Act since that would create “a crazy patchwork of regulations.” The court instead opted for a notion of “existing rights” that allowed for the evolution of rights over time, an evolution that would affirm Aboriginal rights in their contemporary form.

The court then went on to consider how a government might go about proving that an Aboriginal right no longer existed — that it had been extinguished. The court took as a starting point the proposition that governments could, unilaterally, extinguish Aboriginal rights. Indeed, that notion was never challenged in the decision. Rather, the court focused its attention on distinguishing between regulation and extinguishment. The court concluded that in order to prove extinguishment, “...the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.”

In the case before the Court, the fact that the government had regulated the fishery for years and had thus exercised significant powers over the manner of fishing and the amount of fish to be caught by Aboriginal people, could not be seen as extinguishing the Aboriginal right, it was simply an example of the regulation of the right. As a result, the right to fish remained protected by s. 35(1).

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486) in searching for the meaning of terms in the document, perhaps they would not have signed on as quickly.

8. Supra, note 2 at 1091.

9. Ibid., at 1093.

10. Ibid., at 1099.
Finally, the court addressed what the implications were of the recognition of existing Aboriginal rights. The court took the opportunity to reflect on the nature of Aboriginal-government relations over time and to suggest a new context for such relations. The court noted that “for many years, the rights of Indians to their aboriginal lands — certainly as legal rights — were virtually ignored”\textsuperscript{11} and that the Constitution Act represented a political victory for Aboriginal people:\textsuperscript{12}

It is clear that then, that s. 35 (1) ...represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights...Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.\textsuperscript{13}

The court further stated that s. 35(1) should be interpreted in the same manner as other sections of the Constitution Act, in a purposive manner, and in the context of Aboriginal rights, such a purposive approach demands “a generous and liberal interpretation of the words [of s. 35(1)].”\textsuperscript{14} The court went on to state that this approach must take into account the fiduciary relationship between government and Aboriginal peoples:

The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.\textsuperscript{15}

At the same time, the recognition and affirmation of Aboriginal rights did not mean that they now immediately blossomed to their full potential, suddenly free from any government restrictions. While s. 35 (1) does not contain within it any justificatory provisions analogous to s. 1 of the Charter, the court nevertheless felt it necessary to import such a standard to the section. The court was cognizant of the concern that Aboriginal peoples might have of the manner in which such standards might be used by governments:

Our history has shown, unfortunately, all too well, that Canada’s aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contem-

\textsuperscript{11.} Ibid., at 1103.

\textsuperscript{12.} This political victory was obviously not as apparent to Aboriginal peoples themselves who lobbied against the patriation of the Constitution in Canada and in Britain as they felt it did not further Aboriginal aspirations.

\textsuperscript{13.} Supra, note 2 at 1105.

\textsuperscript{14.} Ibid., at 1106.

\textsuperscript{15.} Ibid., at 1108.
porary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.\textsuperscript{16}

The justificatory standard imported into s. 35 by the court for Sparrow, not surprisingly, greatly resembled the test developed by the court for s. 1 cases under the Charter.\textsuperscript{17}

\textit{Sparrow} offered a possible reinvigoration of the notion of Aboriginal rights. The rejection by the Court of the frozen rights doctrine and the requirement that the extinguishment of Aboriginal rights, while still possible, could only be achieved by explicit, clear and plain language, appeared to open new doors for a contemporary recognition of Aboriginal rights. While obviously cognizant of the significance of the decision, the Court did emphasize that this particular case dealt with the assertion of a particular type of Aboriginal right — the right to fish for food for personal and ceremonial purposes — and that, as with all other types of cases, the contours of s. 35 would be developed over time on a case by case basis.\textsuperscript{18} This then leads us to \textit{R v. Van der Peet}.

\textbf{MOVING BACK – \textit{R. v. VAN DER PEET}}

\textit{R v. Van der Peet} was the Supreme Court's first major elaboration on the principles addressed in \textit{Sparrow}.\textsuperscript{19} As in \textit{Sparrow}, the fact situation centred on claims of Aboriginal rights arising from fishing in British Columbia. Unlike \textit{Sparrow}, the claim in this case was to more than simply a right to fish for food and for ceremonial purposes but included the aspect of trading fish caught for other goods. The case was heard by a full nine-judge panel and while there were two dissents,\textsuperscript{20} the majority of seven judges spoke with one voice, the majority judgement coming, as in \textit{Sparrow}, from the Chief Justice, in this case Antonio Lamer.

At the outset of the judgement, Chief Justice Lamer stressed that the rights protected in s. 35(1) are those rights that can somehow be seen to be distinctly Aboriginal rights:

\begin{flushright}
\texttt{\textsuperscript{16. Ibid., at 1110.} \\
\textsuperscript{17. Ibid., at 1111.} \\
\textsuperscript{18. Ibid., at 1113–1114, 1119.} \\
\textsuperscript{19. There is a tendency to speak of the Supreme Court as an entity that somehow exists outside of the nine individuals who make it up. While this tendency is one that is encouraged by the Court, since it emphasizes the permanency and stability of Court decisions, one cannot totally separate the members of the Court from the decisions made by the Court. Where the issue is one of Aboriginal rights it surely cannot be insignificant that one of the authors of \textit{Sparrow}, Chief Justice Dickson, was no longer on the Court when \textit{Van der Peet} was heard. Also missing from the \textit{Sparrow} panel in \textit{Van der Peet} was Justice Wilson who, by the time the decision was rendered, had completed her rather lengthy term as a member of the Royal Commission on Aboriginal Peoples.} \\
\textsuperscript{20. Justices L'Heureux-Dube and McLachlin each wrote dissenting judgements in the case. Unlike other cases before the Court where these two judges were alone in dissent, there has been little discussion of a gender gap issue with regard to the interpretation of Aboriginal rights.}
\end{flushright}
Section 35 (1) it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.21

From that starting point, Chief Justice Lamer then elaborated on the purposive approach to s. 35(1) originally developed in Sparrow:

...the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35 (1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.22

The next step in the court's analysis was to develop a test for identifying Aboriginal rights protected by s. 35 (1). At the outset of the discussion in this area, Chief Justice Lamer stated the essence of the court's position:

...the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.23

For the Court, in order for an Aboriginal right to be recognized as deserving of protection by s. 35 (1) it must, at minimum, be a right that was exercised prior to contact with Europeans. The fact that contact with Europeans preceded any real attempt by Europeans to assert sovereignty over the lands occupied by Aboriginal peoples is not relevant. For Chief Justice Lamer, since Aboriginal rights are founded on the notion that Aboriginal people were in Canada prior to the arrival of Europeans, then it is the period prior to the arrival of Europeans — pre-contact — that is relevant in determining whether or not Aboriginal people carried on practices that could now be protected as Aboriginal rights. In the case at bar, the fact that the Aboriginal accused could not prove that some form of trading of fish for other goods took place prior to European contact, they were unable to rely on the provisions of s. 35 (1).24

The approach taken by the Court in Van der Peet, appears to run counter to the admonitions in Sparrow that Aboriginal rights in s. 35(1) evolve over time and should

21. Supra, note 3 at 534 (emphasis in original).
22. Ibid., at 538 (emphasis in original).

Chief Justice Lamer then goes on to state:

"It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups on Canadian society and which mandates their special legal, and now constitutional, status."

This recognition of the distinctive nature of Aboriginal claims as apart from the claims of ethnic or cultural minorities is often missing from political discourse which tends to lump Aboriginal people in with all other non-majority culture groups.

23. Ibid., at 548.
24. Ibid., at 568.
not be frozen at any particular historical period. Chief Justice Lamer addressed this issue by emphasizing that the concept of continuity of Aboriginal traditions and practices avoids this problem:

The concept of continuity is...the means by which a “frozen rights” approach to s. 35(1) will be avoided. Because the practices, traditions and customs protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.25

The concept of continuity of traditions and practices means that contemporary manifestations of Aboriginal rights are protected. For example, if an Aboriginal right to fish for food is established under s. 35(1), that right is not restricted to the manner in which fish were caught at the time of contact. In this regard, Chief Justice Lamer is correct in saying that Van der Peet is consistent with Sparrow. On the other hand — and much more significantly — by stating that in order to recognize an Aboriginal right it must be proven that the right was exercised at the time of contact, Van der Peet is freezing Aboriginal rights at a particular point in time, in contrast to what the Court said in Sparrow.

This notion of freezing the development of Aboriginal rights at the time of contact is a problematic one. The Court actually spent little time explaining the rationale for the theory, although it did spend time defending the theory from criticism as we will see. In her dissent, Justice L'Heureux-Dube identified five problems with the frozen rights approach.

The first problem with the frozen rights approach is that it overstates the significance to Aboriginal people of the impact of contact with Europeans.26 Aboriginal societies were often in contact with other societies. The results of these contacts could be quite dramatic. In some cases there might be wars conducted, in others, trading of some sort might have been carried out. The interaction between different societies will always have an effect on the development of those societies. Why should we assume that the act of contact with Europeans was of any greater significance to Aboriginal people in terms of form or content than contact with other Aboriginal societies? In fact, given the generally poor state in which Aboriginal people found the first European explorers to Canada, it is certainly questionable as to what degree of significance they attached to contact with a rag tag group of men in danger of dying of starvation or freezing to death through the winter. We will return to the perspective of Aboriginal people to contact later.

25. Ibid., at 557.
Justice L’Heureux-Dube also pointed out that relying on contact as the time for closing off the development of Aboriginal rights is both arbitrary and confusing. There is of course the question of when contact occurred. L’Heureux-Dube asked which of the visits of Cabot, Cartier or Verrazzano represents European contact? One could go further of course. There is evidence that Vikings landed in Newfoundland well before the arrival of John Cabot. Since the Vikings came from Europe, did this contact, assuming that there was contact, serve as the cut-off date for the development of Aboriginal rights protected by s. 35 (1)? On the West Coast there may be evidence that contact was made with explorers from Asia prior to contact with Europeans, does that contact serve as the end point for the development of Aboriginal rights? Anthropological evidence now suggests that there may have been non-Aboriginal peoples on the West Coast thousands of years ago. Would contact with these non-Aboriginal people freeze the development of Aboriginal rights at the time of that contact?

Historical and anthropological evidence regarding contact between Aboriginal and non-Aboriginal peoples in Canada is constantly under review. Would future evidence revising the time of contact back in time result in revisions of what constituted Aboriginal rights? Could a finding of the Court in say, 1998, that the Aboriginal rights of a particular First Nation were to be determined based on contact at one date be subject to revision by a subsequent Court if earlier contact were later proven?

Related to this problem is of course the fact that Aboriginal societies came into contact with European explorers at different times. If the cut-off date for the development of Aboriginal rights was a declaration of sovereignty by Britain or France at a time when such a declaration could have been legitimately supported, then at least the theory would have the virtue of providing a consistent date for the freezing of rights across the country. If simple contact is all that is required however, then it would seem that Aboriginal rights would crystallize in different places at different times, presumably allowing for the prospect that different Aboriginal societies would be able to assert different rights today.

Take for example, a tribe living in close proximity to a European settlement. Based on the majority reasoning, if a trade in goods emerged as a result of this contact — a trade that previously was not engaged in by the tribe — then the trade could not be seen to be an Aboriginal right because it occurred after contact. If that tribe then

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27. Ibid., at 597.
28. Ibid.
29. With regard to this point Justice McLachlin states in her dissent:

“For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th century A.D. To argue that aboriginal rights crystallized then would make little sense…” Ibid., at 635.
30. Denying the impact of this contact, would seem to be an example of a truly Euro-centric bias in the Court.
went out into the country and began trading with other tribes who had not had contact with the European settlers, does that mean that the second tribe now has established an Aboriginal right to trade while the first tribe has not? Conversely, has the second tribe, experienced, unbeknownst to them, de facto contact with European society through dealings with the first tribe?

The third problem Justice L'Heureux-Dube raised with the test is that it imposes a heavy burden on Aboriginal claimants to provide evidence of their practices prior to contact. For Justice L'Heureux-Dube, this "constitutes a harsh burden of proof."32

Justice L'Heureux-Dube's fourth difficulty with the frozen rights theory was that it appears to negate any recognition of Aboriginal rights for Metis people.33 Metis society only emerged following significant, continued contact of the most intimate sort with Europeans. Metis people cannot point to any pre-contact experience at all. Yet s. 35 (2) defines Aboriginal people as including Metis. How therefore can Metis people have any rights affirmed and recognized under s 35 (1) under this theory?34

Finally, in contrast to Chief Justice Lamer's assertion that the decision is consistent with earlier decisions of the Court, Justice L'Heureux-Dube contended that the frozen rights approach contradicts the position taken by the Court in Sparrow. She relied on the portion of that judgement which stated:

...the phrase "existing aboriginal rights" must be interpreted flexibly to so as to permit their evolution over time...an approach to the constitutional guarantee embodied in s. 35 (1) which would incorporate "frozen rights" must be rejected.35

In addition to the concerns raised by Justice L'Heureux-Dube, perhaps the most serious problem with the frozen rights test is that it approaches the significance of contact between Aboriginal peoples and Europeans with no regard for the way in which this contact was actually viewed by Aboriginal people. This is particularly distressing as the Court itself emphasized in Van der Peet that in assessing what is integral to Aboriginal culture "Courts must take into account the perspective of aboriginal peoples themselves."36

31. Unless of course it could be proven that such trade pre-dated contact.
32. Supra, note 3 at 598.
33. Ibid.
34. Chief Justice Lamer does respond to this objection in the judgement. He states that while s. 35 includes Metis as Aboriginal peoples of Canada, they have had a distinctly different history than have Indians and Inuit. As a result, the court will wait for the appropriate case to determine the scope of Metis Aboriginal rights under s. 35. Ibid., at 558.

While this approach would recommend itself to a court interested in a case by case development of constitutional rights, it is certainly not clear that s. 35(1) contemplated distinctly different Aboriginal rights among Indians, Inuit and Metis.
35. Supra, note 3 at 599, citing Sparrow at 1093 (emphasis added by L'Heureux-Dube).
36. Supra, note 3 at 550.
One might think that this would be a crucial issue in the quest for the determination of the nature of existing Aboriginal rights in Canada. It order to make a case that Aboriginal rights should be frozen at the time of first contact, some information regarding the way in which Aboriginal people viewed this contact with Europeans would be significant.

The frozen rights model developed by the Court is one which assumes the character of the development of Aboriginal culture, as a unique culture, occurred over centuries only to come to a halt when contact was made with Europeans. While clearly Aboriginal culture continued to develop after contact, the Court is saying that the nature of this development differs qualitatively from prior developments. The only possible difference of course, is that the contact in this case was not with other Aboriginal people but with Europeans. One might be able to make a case from the European point of view on the impact of such contact, but such a viewpoint does have a self-serving aspect to it. It would not be unusual at all for Europeans to over-exaggerate the impact they had on the development of Aboriginal culture. As noted earlier, the nature of first contact with Aboriginal peoples by European explorers was not often one that suggested that the Europeans brought anything of significance to the land other than the need for assistance in basic survival.

On the other hand, there appear to be great practical difficulties in attempting to determine the state of mind of Aboriginal people at the time of contact. How can the Court, hundreds of years later, make any sort of meaningful determination as to the state of mind and intentions of Aboriginal people at the time of contact? How can the Supreme Court of Canada, nine, non-Aboriginal lawyers, come to grips with the perspective brought to bear by Aboriginal people meeting Europeans for the first time. Inviting the court to engage in this type of speculation would appear to be fruitless. For practical reasons alone then, it may well be that, despite admonitions to consider the perspectives of Aboriginal people, the court really has no practical way of making this a reality.

John Borrows addresses this issue in an article entitled Constitutional Law From a First Nation Perspective. Borrows maintains that in looking at issues from a First Nations perspective, different interpretations of historical legal documents will be revealed. The significance of this approach is that:

Since the source of judicial power often cascades from the dominant group’s ideological headwaters, bias spills into the pages of legal decisions from a contextualized, politically hued stream. The ideological undertones of judicial decisions are revealed when reviewed through the eyes of communities that are disadvantaged by the exercise of legal power. Alternative meanings can be assigned to legal doctrines as people with a different source and colour of ideological values provide their insights. Situating the interpretations and consequences of judicial decisions in

affected communities gives a voice to people who are disadvantaged by the application of law.\textsuperscript{38}

In his article Borrows illustrates how such a perspective could inform the court’s understanding of documents such as the Royal Proclamation of 1763 and the subsequent Treaty of Niagara. While the Royal Proclamation is often seen as a declaration of sovereignty by Britain over North America, from a First Nations perspective it could also be seen as a declaration ensuring Aboriginal sovereignty over Aboriginal lands.\textsuperscript{39} Borrows contends that the Proclamation intentionally fostered both viewpoints in order to accomplish the goals Britain had for the region in the political context in which they were operating.\textsuperscript{40} To support this thesis, Borrows relies on the Treaty of Niagara of 1764. The Treaty of Niagara, one of the first treaties to be signed following the Royal Proclamation, and thus presumably entered into by Britain in the spirit of the Proclamation, confirmed to Aboriginal people that they were not giving up their sovereignty to Britain.\textsuperscript{41} The treaty was an incredibly significant event in Aboriginal-British relations. Over two thousand chiefs representing over twenty-four nations from Nova Scotia to Mississippi to Hudsons Bay gathered for the treaty making.\textsuperscript{42}

The use of term treaty-making is significant here. There is a tendency in Western legal thought to speak of treaty signings and to place the emphasis on the words used in the treaties in order to determine their meaning. Other discussions or manifestations of intentions between the parties at the time are regarded as insignificant or tangential. Borrows points out the treaty was made by the exchange of presents and wampum belts in addition to signings. The Aboriginal representatives relied on the two-row wampum to signify their acceptance of the treaty. The two-row wampum was not a new feature in Aboriginal-British negotiations, indeed it had been a fixture of them. Borrows quotes Robert A. Williams, Jr., an Aboriginal legal scholar on the significance of the two-row wampum:

When the Haudonesaunee [Iroquois] first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and these two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows they symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other’s vessel.\textsuperscript{43}

\textsuperscript{38} Ibid., at 88–89 (footnotes omitted).
\textsuperscript{39} Ibid., at 104–105.
\textsuperscript{40} Ibid., at 105.
\textsuperscript{41} Ibid., at 107.
\textsuperscript{42} Ibid., at 109.
\textsuperscript{43} R. A. Williams, Jr."The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence" (1996) Wisc. L. Rev. 219, 291 cited in Bor-
The use of the two-row wampum at the Treaty of Niagara emphasized the fact that Aboriginal people did not intend to give up sovereignty in their negotiations with Britain. Nor can it be asserted that the use of two-row wampum was simply another example of misunderstanding between the parties. Borrows makes the case that the British negotiator at Niagara, Sir William Johnson, knew full well the meaning of the two-row wampum and its implications.44

Borrows’ work suggests that it is simply wrong to rely on the written words of treaties and documents such as the Royal Proclamation to interpret their meaning since reliance on text alone does not convey the true meaning of the documents themselves. The two-row wampum is not significant because it provides a context for understanding what Aboriginal people thought the Treaty of Niagara to be — it is not, in this context, an interpretative tool — rather it is, for Aboriginal people, what the text is to those raised in Western legal traditions. To raise the text over the two-row wampum because the common law prefers the certainty of the written word, is to make a value choice, and that choice denigrates the equally relevant preference by Aboriginal people for reliance on documents such as the two-row wampum. The challenge that Borrows presents in suggesting that constitutional law be approached from an Aboriginal perspective is that the Court must now approach matters giving equal weight to the way in which these documents were seen by Aboriginal people and by the Crown.

While this approach may seem somewhat radical in that it encourages the Court to examine documents that fall outside of the traditional forms of contract-making, it really is not that far a jump for the Court and one that is required if the Court truly wishes to take into account the perspectives of Aboriginal people themselves. Just as with the interpretation of other historical documents, this approach requires evidence and reliance on experts in the field. The difference is that the experts relied upon and the documents themselves are of a slightly different nature.

In many ways, what is being suggested is that the Court approach constitutional issues involving Aboriginal people by asking themselves what would the reasonable Aboriginal person at the time have understood by a particular document. This hardly seems radical. Realizing that different people understand things in different ways and through different means is simply an acknowledgement of reality. Giving weight to Aboriginal ways of understanding documents such as the Royal Proclamation and various treaties is a pre-requisite to treating Aboriginal people with the respect that the Court suggests they deserve but have not often received from either the government or the courts. This approach appears consistent with the Court’s development of an

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44. Supra, note 37 at 112.
understanding of power relationships and dynamics among people that are based on, among other things, race and gender.\textsuperscript{45}

How might this perspective have changed the Court’s approach in \textit{Van der Peet}. As detailed earlier, the frozen rights approach as developed by the Court is fraught with problems. The approach assumes that a particular result of contact, the assertion and exercise of sovereignty over Aboriginal people by European explorers and missionaries, can be inferred from the moment of contact. The court is suggesting that somehow, both Europeans and Aboriginal people knew that the inevitable result of contact would be domination by Europeans. If this were not the case, why should contact with Europeans have any more significance to Aboriginal people than contact with other Aboriginal people?

While European explorers, traders, missionaries and settlers might have been quick to assert sovereignty, this assertion was primarily a one-way street. While Aboriginal people co-existed with Europeans as they co-existed with other Aboriginal peoples, they were certainly under no impression that they had given up anything as a result of contact. Reliance on documents such as the Royal Proclamation or various treaties to prove a recognition of sovereignty by Aboriginal peoples, is, according to Borrows, problematic. Aboriginal understanding of contact meant the necessity for agreements that would guarantee co-existence. Bringing the Aboriginal perspective to the discussion makes the frozen rights doctrine difficult to uphold. Rather, reliance on the Aboriginal perspective would lead to an expansive view of “existing” rights under s. 35(1) and would certainly make the argument for extinguishment under the provisions of \textit{Sparrow} much more limited.

\textbf{REALITY CHECK – THE PRACTICAL POWER OF THE COURT}

The foregoing analysis suggests that the \textit{Van Der Peet} decision was a serious misstep for the Court following the ground it had broken in \textit{Sparrow}. The weak reasoning used by the Court to justify the frozen rights approach would seem to justify every concern that Aboriginal people have voiced about the ability of the Court to resolve issues of Aboriginal rights. There is no question that the Court deserves criticism for its approach in \textit{Van der Peet}. However, the result in \textit{Van der Peet} is one that should not really be surprising. Placing the blame for this backwards step in Aboriginal rights solely at the feet of the Supreme Court is wrong because it ignores the reality of the limited nature of the power of the Court and its complex relationship with the governments of the day.

\textsuperscript{45} See for example, the judgement of Justice L’Heureux-Dube in \textit{Egan and Nesbitt v. Canada} [1995] 2 S.C.R. 513 (Supreme Court of Canada) and the various judgements in \textit{R v. S (R.D.)} (more popularly known as \textit{R.D.S. v. The Queen}) – File #25063, September 26, 1997 (Supreme Court of Canada). This area is one that is clearly in its early stages of development by the Court and speculation as to where these preliminary forays might lead are certainly premature. On the other hand, it cannot be denied that these cases suggest that the Court is taking the first steps towards a new judicial understanding of race, gender, and power in Canada.
The standard view of judicial review suggests that on the one hand there is the legislature and on the other hand the Court. The legislature makes laws, the Court interprets those laws in light of the provisions of the Constitution. Laws that the Court find fail to meet the standards of the Constitution are, according to s. 52 (1) of the Constitution Act "to the extent of the inconsistency, of no force or effect.” Simply put then, the power of the legislature is to make laws, the power of the Court is to disallow laws that offend the Constitution. Judicial review allows for checks and balances in the system.

But where does the power of the Court come from? Of course, on one level it comes from the Constitutional document itself. Thus in Motor Vehicle Reference, Chief Justice Lamer rejects concerns that judicial review will excessively expand the Court’s powers by stating that these powers were given to the Court by the Constitution, they did not represent any sort of power-grab by the Court itself. But this response does not really answer the question about the Court’s power. Regardless of the words written in the Constitution Act, why is it that Court decisions are followed?

Alexander Bickel, the U.S. constitutional scholar, addressed this issue in his book The Least Dangerous Branch. Bickel points out that concerns regarding the power of judicial review and the potential for abuse by the court, are kept in check by the fact that the Court has no real enforcement mechanisms of its own other than the political capital it has managed to create over time with both citizens and politicians. It is for this reason that the Court is the least dangerous branch in the American triumvirate of the Congress, the Cabinet and the Supreme Court. Unlike the former two bodies, the Supreme Court, cannot of its own volition, compel any compliance with its decisions. Bickel believes that this lack of enforcement power is important because it allows for the tide of public opinion to influence the Court and to undermine decisions that appear to go too far.

There are many examples of this phenomenon in action. Michael Mandel, in his critique of the expansion of judicial review in Canada, The Charter of Rights and the Legalization of Politics in Canada, notes that the historic decision of the U.S. Supreme Court in Brown v. Board of Education and their antecedents have had no significant effect on desegregation of the schools in Topeka, Kansas, over 40 years after the Court rendered its verdict. Civic obstinance to the Court’s decision created

46. Reference re Section 94(2) of the Motor Vehicle Act, p. 497.
48. Ibid., at 28.
50. 347 U.S. 483 (1954) (United States Supreme Court).
51. Supra, note 49 at 51.
a situation where, despite the various orders of the Court, little of substance ever occurred to change the real dynamics in the city.

In Canada of course, the power of the Supreme Court to overturn legislation is further limited by the presence of s. 33 of the Constitution Act — the "notwithstanding clause." Section 33 allows any legislature in Canada to enact laws in violation of certain provisions of the Charter of Rights so long as the legislation explicitly acknowledges that it is to operate notwithstanding the provisions of the Charter. To date, s. 33 has only been used once, by the Province of Quebec, following the decision of the Court regarding the use of French on signs in Ford v. Quebec.

The fact that s. 33 has rarely been used by legislatures might be seen as a sign of the strength of the Court. On the other hand, s. 33 is perhaps better seen as imposing real constraints on the Court. The theory behind s. 33 is that it will rarely be used because governments will not wish to raise the ire of voters by being seen to explicitly and flagrantly take away rights guaranteed to them under the Charter. This fear, it has been argued, restrains governments and means that resort is rarely made to s. 33.

This particular theory of governmental restraint — that use of s. 33 will cause a huge political backlash — only works as long as it is not tested and found wanting. Were legislatures to use s.33 and find that the sky does not fall down around them, then of course, reticence to use s. 33 would vanish and it might well become a regular feature of the political landscape. Regular and constant use of s. 33 without political implications would then seriously impair the power of the Court to overturn unconstitutional measures enacted by the legislature.

This reality requires the Court to engage in constant dialogue with the legislature. While the conventional image of judicial review sees the legislature in one corner and the Court in another, each operating in isolation from each other, the need for the Court to maintain its political power and capital requires that the two bodies speak to each other regularly. Now of course, such speech cannot be carried out behind closed doors in the proverbial smoky backrooms. It would be terribly improper to have politicians tell the Court what type of decisions are likely to spur spirited and persistent cries for the use of s. 33, and it would be equally inappropriate for judges to talk to politicians about how far they might realistically be able to go in overturning legislation. These constraints however, do not prevent dialogue, it just means that dialogue is carried out slowly, over time, and in a number of relatively public forums.

The clearest way in which the Court speaks to the legislature is through its decisions. In Ford, for example, the Court went to some lengths to suggest to the Quebec

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52. Section 33 can be used to override Charter protections found in s. 2 (fundamental freedoms — freedom of religion, speech, association) and ss. 7–15 (legal rights and equality rights). Section 33 also contains within it rules to limit the term of such constitutional exemptions without referral back to the legislature. Section 33 cannot apply to decisions made pursuant to s. 35(1) since it is not part of the Charter.

legislature what types of restrictions on the use of languages other than French would be constitutionally acceptable and thus tried to provide, within the decision, an alternative to reliance on s. 33.\textsuperscript{54} The necessity for the message was clearly the obvious significance of the decision to the people of Quebec.

The Court understands when it is moving into areas that might engender criticism, and it is particularly in such cases where it seeks to initiate dialogue with the public and the legislature. For example, in \textit{R v. Daviault},\textsuperscript{55} the Court went to some lengths to address the concerns that a finding that the principles of fundamental justice in s. 7 require that an individual be permitted to raise the defence of extreme intoxication would create a dangerous environment in the country. For the majority, Justice Cory indicated that first, it was open to Parliament to "fashion a remedy which would make it a crime to commit a prohibited act while drunk,"\textsuperscript{56} and second, that this decision was limited to very few situations and thus would not lead to any significant increase in danger to the public.\textsuperscript{57}

The clarity of the Court's message is reduced when decisions are seriously split and conflicting reasons are given.\textsuperscript{58} In addition, judicial turnover at the Supreme Court also blunts the ability of the legislature to process what the Court is saying.\textsuperscript{59}

As noted earlier, the process engaged in here is one of dialogue. As the Court speaks to the legislature so the legislature speaks to the Court. In the wake of the public backlash with the Daviault decision, federal politicians indicated that they were not

\textsuperscript{54} With reference to laws restricting the language used on signs, the Court said:

"...requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under ...s.1 of the Canadian Charter..." \textit{Ibid.}, at 780. The province chose to ignore this advice and relied on s. 33.

\textsuperscript{55} [1994] 3 S.C.R. 63.

\textsuperscript{56} \textit{Ibid.}, at 100.

\textsuperscript{57} "In light of the experience in Australia or New Zealand, [where legislation along the lines of that suggested by the Court was in place it cannot be said that to permit such a defence would open the floodgates to allow every accused who had a drink before committing the prohibited act to raise the defence of drunkenness." \textit{Ibid.}, at 103.

\textsuperscript{58} For example the majority in \textit{RJR-MacDonald Inc., v. Canada}, [1995] 3 S.C.R. 199 — the tobacco advertising case — provided examples of the type of legislation that would be constitutionally valid, however the fact that the Court split 5-4 on the matter and that there were three different majority judgements, makes it difficult for the legislature to act upon the suggestions from the Court. A similar situation arose in \textit{R. v. Morgentaler}, [1989] 3 S.C.R. 463 where the five majority judges wrote three judgements (2, 2, 1) with no plurality apparent.

\textsuperscript{59} What weight, if any, should the legislature put on the judgement from a judge who no longer sits on the Bench? If the judgement is a unanimous one, then one would think that it would still carry a great deal of weight, if it is a lone judgement, regardless of whether it is majority or minority judgement, then it would likely carry much less weight.
inclined to take up the Court’s suggestion to enact a “wilful drunkenness” law and that they might well prefer the law as it was prior to the decision.

A similar situation is underway now with regard to laws governing the disclosure of therapeutic records in cases of sexual assault. In *R v. O’Connor* the Supreme Court set down rules for the disclosure of therapeutic records to the defence by complainants in sex assault cases. That decision too generated a great deal of concern, particularly from women’s rights advocates who felt that the ruling could both make women reluctant to bring charges against their assailants and/or refuse to seek treatment for assaults until after the legal process was finished. In response to the decision, Parliament passed Bill C-46 which the government hoped would go some way in meeting women’s concerns. For this reason, Bill C-46 did more than simply mirror the Court’s decision in *O’Connor*. Now, some trial court judges are finding the new legislation unconstitutional in that it goes beyond what the Court set down in *O’Connor*. As the matter inevitably wends its way to the highest court in the land, the judges of the Supreme Court will be able to reflect on the need for retrenchment in light of public sentiment.

One of the advantages to both the Court and the legislature of this dialogic process is that it takes place slowly over time. Since matters do not reach the Supreme Court quickly, both sides can watch to see how public opinion evolves. Although some Court decisions may be met initially with great hostility, over time, much of the discontent may ebb, thus reducing the need for Parliament to act and for the Court to reconsider its earlier judgements.

All of the cases referred to thus far have been criminal or quasi-criminal offences. The Court has been less inclined to weigh in as dramatically on matters that fall outside of the criminal justice realm. The Court’s experience in these areas is particularly useful in understanding their response to Aboriginal rights cases.

In areas of what might be called social policy, there is a tendency for the Court to more easily defer to the legislature. The case of *Irwin Toy v. Quebec* is an example of the Court relaxing its standards under the *Oakes* Test in cases where the legislature is mediating “between the competing claims of different groups.”

There are a number of cases which demonstrate the Court’s unease about addressing what might be seen as social issues. Perhaps the most succinct and honest statement


61. The RJR-MacDonald case is often thought of as a non-criminal matter since it deals with the advertising of tobacco. Certainly this opinion was not held by Justice McLachlin, who noted for the majority, that failure to follow the provisions of the statute resulted in criminal-type sanctions and thus viewed the law as a piece of criminal law. RJR-MacDonald, supra, note 58 at 322.


63. *R v. Oakes*, [1986] 1 S.C.R. 103. Although the Court often points out that the *Oakes* test is not really a test, *per se*, but a set of guidelines (see *R v. Keegstra*, [1990] 3 S.C.R. 697 at 735, for example) the tendency in legal circles is to refer to it as the *Oakes* test.

64. *Supra*, note 62 at 994.
of the Court’s position came from Justice Sopinka in Egan and Nesbitt v. The Queen. In concluding his section 1 analysis of the claim by the applicants that the refusal to extend the definition of “spouse” in the Old Age Security Act to same-sex couples he said:

It may be suggested that the time has expired for the government to proceed to extend the benefits to same-sex couples and that it cannot justify a delay since 1975 to include same-sex couples. While there is some force in this suggestion, it is necessary to keep in mind that only in recent years have lower courts recognized sexual orientation as an analogous ground, and this Court will have done so for the first time in this case. While it is true, as Cory J. observes, that many provincial legislatures have amended human rights legislation to prohibit discrimination on the basis of sexual orientation, these amendments are of recent origin. Moreover, human rights legislation operates in the field of employment, housing, use of public facilities and the like. This can hardly be equated with the problems faced by the federal government which must assess the impact of extending the benefits contained in some fifty federal statutes. Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the Charter.

Perhaps the case that best illustrates the dilemma faced by the Court when venturing into the social policy area is McKinney v. Board of Governors of the University of Guelph. McKinney was a challenge to the policy of mandatory retirement. The Court had no difficulty finding that mandatory retirement was discrimination on the basis of age. Where the Court divided, was on whether or not such discrimination could be upheld under s. 1. The majority of the Court opted for a deferential approach, one that recognized that the area of mandatory retirement was now firmly entrenched in Canadian society and where there was a welter of conflicting social science evidence on its effects. Writing for the majority, Justice LaForest said:

What we are confronted with is a complex socio-economic problem that involves the basic and interconnected rules of the workplace throughout the whole of our society. As already mentioned, the legislature was not operating in a vacuum. Mandatory retirement has long been with us; it is widespread throughout the labour market; it involves 50% of the workforce. The legislature’s concerns were with the ramifications of changing what had for long been the rule in such important social issues and its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed almost every aspect of the employer-employee relationship.

65. Egan, supra, note 45 at 576. While Sopinka might be given high marks for honesty, the notion that enforcement of equality rights under the Charter is dependent on the ability of the group in question to show it has made sufficient inroads into the public consciousness so as not to have their claim seen as “novel” does seem to limit the reach of the section significantly.

In cases such as *Egan* and *McKinney*, the perceived enormity of the steps the Court would be taking in declaring the challenged pieces of legislation unconstitutional, served to convince a majority of the Court that such a move would not be in the best interests of society as a whole. One might say that in these cases, there was no need for an ongoing dialogue, because the Court was sufficiently aware of the implications of their decisions and what might possibly arise as a response from the legislature.

**THE SUPREME COURT AND ABORIGINAL RIGHTS**

In light of the previous discussion, how can we best characterize the Court's decisions in the area of Aboriginal rights? When the Supreme Court considers a case, it has before it a series of questions it seeks to answer. Those questions are, for the most part, resolved by a simple yes or no. This leads to the assumption that Court decisions can best be seen as zero-sum games with one party winning and the other party losing. It is not clear, however, that a simple winner/loser analogy truly captures the real results of a Supreme Court decision. This is particularly the case when the Supreme Court acts in the area of what might broadly be termed Aboriginal rights.

Since the Court's enforcement mechanisms are limited to its ability to persuade and call upon political will, where the Court is asked to set out the broad parameters of the rights of various parties, it is not at all clear that a victory in court will, of necessity, translate into a victory in fact. The ability to turn a court victory into a practical victory often lies outside of the competence of the Court itself and falls back upon the relative strength of the parties.

In the area of Aboriginal rights, therefore, the best result that Aboriginal people can hope for from the Court is one that gives them additional power to attempt to negotiate the resolution of specific issues — for it is only through negotiation, not the Court, that Aboriginal rights can truly be secured.

In general, in deciding any Aboriginal rights case the Court has two options. If it sides with the government it means a rejection of the particular right being advanced, if it sides with the Aboriginal applicants, it means that the applicants are now better positioned to negotiate for what it is they went to Court to achieve in the first place.

While the latter outcome is not nearly as conclusive an outcome as might be hoped for, it is nevertheless significant. The obvious difficulty with Aboriginal-government negotiations is that Aboriginal people come to the table with little to negotiate with. If Aboriginal rights are only those rights that the government is prepared to recognize, then the negotiation process, despite all the trappings, becomes essentially a take it or leave it process. Unless Aboriginal people can rally a great deal of political will on their side, real negotiations with government are not likely to occur.

From the perspective of Aboriginal litigants therefore, the role of the Supreme Court is to provide them with some better cards to take to the table, not to determine who wins or loses the particular game. At the same time, if the Court sees that the government will not even come to the table after they have managed to deal the Aboriginal players a bigger hand, then the pressure rises on the Court to retrench when the Aboriginal litigants return for even better cards. An understanding of this process helps explain the Court’s decisions in both Sparrow and Van der Peet.

Seen in this light, the following quote from Sparrow is perhaps more understandable now than it was when used initially in this paper:

> It is clear that then, that s. 35 (1) ...represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights...Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.68

This quote illustrates that the Court understands its role in the area of Aboriginal rights to be, at its most positive, to open the door a little wider and to push negotiations on a little further. In a commentary on the Sparrow case, Ian Binnie reaches a similar conclusion:

> ...the Court has used the occasion [of the Sparrow decision] to make comments seemingly designed less to clarify the law than to drive government and Aboriginal organizations alike into negotiations for fear of what...thunderbolts the Supreme Court might (or from the Aboriginal leadership perspective, might not) hurl in future section 35 cases.69

The meaning of the Sparrow decision was also not lost on Georges Erasmus, at the time of the decision National Grand Chief of the Assembly of First Nations.70 At the time the Sparrow decision was released Erasmus said that it strengthened the hand of Aboriginal people in their negotiations with the government.71

The extent to which Sparrow could be seen as potentially expanding the scope of Aboriginal rights can be seen from the Royal Commission on Aboriginal Peoples’ interpretation of s. 35(1) in light of Sparrow. In Partners in Confederation, the first substantive document produced by the Commission, they wrote:

> There are persuasive reasons to conclude that [the Aboriginal] right of self-government was still in existence when the Constitution Act, 1982, was enacted. As such it qualifies as an “existing” right under section 35 (1).72

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68. Supra, note 2 at 1105.

69. W.I.C. Binnie, “The Sparrow Doctrine: Beginning of the End or end of the Beginning?” 15 Queens Law Journal 217 at 219. It will be interesting to see what thunderbolts Justice Binnie will throwing when he has the opportunity to consider his first s. 35(1) case.

70. Later of course he was named co-chair of the Royal Commission on Aboriginal Peoples.

71. Globe & Mail (June 1, 1990) 1.

There is no doubt that the potential implications of *Sparrow* were quite broad. As Binnie noted however, *Sparrow* itself, did not provide any detailed listing of what existing Aboriginal rights actually were. As noted earlier, the Court stressed in its decision that the case only applied to the Musqueam’s contention that s. 35(1) allowed them the right to fish for food and for ceremonial purposes. *Sparrow* thus became the basis for the hopes of many Aboriginal people that meaningful negotiations might now take place on the delineation of Aboriginal rights. For the Royal Commission on Aboriginal Peoples, which had eschewed any suggestion that issues of Aboriginal rights should be determined by way of constitutional amendments in light of the failure of the Charlottetown Accord and the apparent unwillingness of the Canadian populace to contemplate any more constitutional discussions, *Sparrow* became the linchpin of their elaboration of Aboriginal rights.

Of course, *Sparrow* could also be approached from another perspective. The section 1-like limitations incorporated into s. 35(1) by the Court could be seen to suggest that the actual reach of the decision was quite limited. For Binnie:

... [in] integrating [Aboriginal] rights into the balancing act of the ordinary legal system to the extent envisaged by Sparrow, the Court may, with hindsight, in the eyes of some Aboriginal leaders cease being part of the solution and start becoming a part of their problem.73

Given the Court’s desire to use its decision to spur on the negotiation process, it is not surprising that a level of ambiguity should persist as a result of the *Sparrow* decision. Indeed, for the decision to have any effect on negotiations in the area of Aboriginal rights, a level of ambiguity was essential. If one party knew that the Supreme Court would find in its favour the next time Aboriginal rights came before it, then that party would have little incentive to engage in any substantive negotiations.

Under the circumstances, and given its institutional limitations, it would appear that the Court went as far as could reasonably be expected in *Sparrow*. By providing Aboriginal peoples with a potentially broad range of existing Aboriginal rights, it presumably gave them some significant cards to play. The threat that the Court might further expand those rights in a future case would seem to provide governments with a good incentive to wish to sit down and talk. On the other hand, by introducing a “reasonable limits test” into s. 35(1) and providing very little guidance as to what those limits might be, the Court also encouraged Aboriginal groups to proceed by way of negotiation in order to develop certainty in the development of rights rather than relying on an *ad hoc*, uncertain, Court driven approach.

There is no question that the combination of the decision in *Sparrow* and the election of NDP governments in Ontario and British Columbia did advance the negotiation process in those provinces. In some ways the *Sparrow* decision provided an external impetus to both governments, historically sympathetic to Aboriginal issues, to enter

into substantive negotiations with Aboriginal groups without the fear of being labelled "pro-Aboriginal" by the opposition. *Sparrow* also provided an external justification for these governments to come to agreements with Aboriginal groups that they may well have been willing to arrive at without the decision.

On the other hand, there were limits to what could be obtained through negotiations with individual provinces. In Ontario, the government signed a Declaration of Political Relations with Aboriginal political organizations that had symbolic importance but little practical import. The province also negotiated some food hunting and food fishing agreements in light of the *dicta* in *Sparrow*. In British Columbia as in Ontario, *Sparrow* led to the conclusion of a number of agreements regarding increased Aboriginal access and control over fisheries. In terms of more comprehensive matters, such as treaty-making, the province did manage to successfully negotiate at least one treaty, however the impending approach of an election and fears of political backlash stalled the process. The Gitksan and Wet'suwet'en First Nations put their appeal of the British Columbia Court of Appeal decision in *Delgamuukw v. B.C.* on hold because of the promise of substantive negotiations. After a few years of unsuccessful discussions however, *Delgamuukw* was argued before the Court in 1997. The implications of the Supreme Court's decision in this case will be discussed later.

In terms of negotiations with the federal government, the major player in Aboriginal rights matters, *Sparrow* had little impact. The government consistently ignored the various reports issued by the Royal Commission on Aboriginal Peoples and also largely ignored the Assembly of First Nations as well in terms of the negotiation process. The government did sit down with individual First Nations to discuss Aboriginal rights issues but these discussions were based largely on the municipal model of the devolution of powers.

In this context, *Van der Peet* found its way to the Supreme Court. The Court found itself in a difficult position. Despite its best efforts, *Sparrow* had not generated any major breakthroughs in Aboriginal rights. The federal government did not take the opportunity to use *Sparrow*, or the Royal Commission's various elaborations on *Sparrow*, to embark upon any sort of meaningful nation-wide consideration of Aboriginal rights. In its presentation to the Court in *Van Der Peet*, the government advocated the frozen rights doctrine. Given the either/or nature of constitutional litigation the Court was faced with two choices.

On the one hand, it could attempt to re-invigorate the non-existent negotiation process by upping the ante in *Sparrow* and starting to flesh out in some detail the nature and extent of existing Aboriginal rights. Since *Van der Peet* was a case where more than a right to fish for food was being asserted, a decision in the case that could be seen to extend Aboriginal rights potentially into the commercial realm would have great significance.

On the other hand, the federal government had made it clear that it was not coming to
the negotiating table even with the chance that the Court might expand its ruling in
Sparrow in future cases. Public support for Aboriginal rights appeared to wane when
people understood that Aboriginal rights might actually mean that Aboriginal people
had a preferred entitlement over non-Aboriginal people to things like the salmon
fishery. In terms of the legislature-court dialogue, the federal government's reluctance
to negotiate after Sparrow spoke volumes regarding the lack of political will that
existed for an expansion of Aboriginal rights.

Without the security of knowing that there was the political will to support its decision,
it is not surprising that the Supreme Court retrenched on the issue of Aboriginal rights
in Van der Peet. Indeed, after having been essentially rebuffed by the federal govern-
ment after Sparrow, it was unlikely that the Court was going to try to force the issue
by raising the stakes in the Aboriginal rights negotiating process.

There is no question that Van der Peet is a disappointing judgement. There is also no
question that the frozen rights theory sets back the cause of Aboriginal rights from the
theoretical heights it reached following Sparrow. At the same time, the result in Van
der Peet was certainly predictable. Rather than blaming the Supreme Court for a lack
of courage, blame would be better placed with the federal and (some) provincial
governments for lack of leadership in advancing Aboriginal issues. In the face of
political and public disinterest — not to mention potential overt hostility — it is
unrealistic to expect the Court to move forward in an area as complex as Aboriginal
rights.

For Aboriginal people, the failure of Sparrow to move the political agenda forward is
certainly disappointing. The difficulty facing those who support an expansion of
Aboriginal rights in the face of governmental intransigence is that while the Court
may be the only source, outside of public opinion, where Aboriginal people can obtain
additional bargaining power, the very fact of this intransigence makes it unlikely that
the Court will provide such relief.

POST-SCRIPT – THE DECISION OF THE SUPREME COURT OF CANADA
IN DELGAMUUKW
Just prior to the submission of this paper for publication, the Supreme Court of Canada
released its judgement in Delgamuukw v. British Columbia. Delgamuukw will no
doubt spawn a raft of articles and commentaries since it represents the Court's most
comprehensive decision yet on the issue of Aboriginal title. For the purposes of this
paper, reference to Delgamuukw will focus on the way in which the decision does or
does not fit within the framework for judicial decision-making in Aboriginal-rights
cases outlined earlier.

75. S.C.C. file # 23799, judgment released December 11, 1997. As the judgement has not yet been
reported, reference to the judgement will be to the particular numbered paragraphs.
As noted above, *Delgamuukw* concerned itself with issues of Aboriginal title. For the Court, Aboriginal title and Aboriginal rights are two related yet distinct concepts. Chief Justice Lamer, writing an essentially unanimous judgement of the Court\(^{76}\) stated in this regard:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may themselves be aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices customs, and traditions which are integral to the distinctive cultures of aboriginal societies.\(^{77}\)

For this reason, *Delgamuukw* does not really follow the *Sparrow* and *Van der Peet* line of cases, but rather starts a new, post-s. 35 (1) jurisprudence on the issue of Aboriginal title. While the decisions in the former two cases are relevant to the Court’s decisions, they are not binding since they did not directly concern themselves with the issue of Aboriginal title.

*Delgamuukw* involved a claim by the Gitskan and We’suwet’en First Nations for a declaration of Aboriginal title over 58,000 square kilometres of land in British Columbia. Due to, among other things, defects in the pleadings by the applicants, and more significantly, errors by the trial judge in placing adequate weight on evidence of historical practices adduced by witnesses for the applicants, a new trial was ordered. In addition to simply ordering a new trial, the Court took the opportunity to set down some principles regarding the use of oral historical evidence and the nature of Aboriginal title.

In terms of reliance on oral histories the Court essentially restated its position in *Van der Peet*:

> ...the trial judge gave no independent weight to these...oral histories because [he felt] they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, ...these are features, to a greater or lesser extent, of all oral histories...The implication of the trial judge’s reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.\(^{78}\)

\(^{76}\) Justices Cory and Major concurred with Chief Justice Lamer, Justice McLachlin wrote a brief (one-paragraph) judgement in which she essentially agreed with the Chief Justice, and Justice LaForest, while agreeing with the conclusion reached by the majority, distinguished his analysis in some ways from the majority.

\(^{77}\) *Supra*, note 75 at para. 111.

\(^{78}\) *Ibid.*, para. 98.
From an evidentiary point of view, this statement by the Court should make it easier for Aboriginal applicants to prove Aboriginal title in future cases. The Court has not moved however to a position along the lines of that advocated by John Borrows outlined earlier.

In order to prove Aboriginal title, the Court set down three criteria: i) the land must have been occupied prior to sovereignty; ii) there must be continuity between present and pre-sovereignty occupation; and iii) occupation, at sovereignty, had to be exclusive. In terms of viewing these criteria in light of the Sparrow and Van der Peet line of cases the following comments can be made. Criterion three is unique to issues of Aboriginal title, criterion two follows Van Der Peet's notion of 'continuity' and criterion one is a departure from Van der Peet.

It will be recalled that with regard to Aboriginal rights, the Court in Van der Peet emphasized contact as the cut-off date for the establishment of such rights. Now, in the case of Aboriginal title, the Court is focussing on the actual date of Crown assertion of sovereignty over the land in question. Given the many problems inherent in the Van der Peet notion of freezing rights at contact, it might be hoped that Delgamuukw marks a step away from this approach. The Court however made it clear that freezing Aboriginal rights at contact is still *dicta*, the change in this case arose solely from the fact that Aboriginal title is distinct from Aboriginal rights:

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. The relevant time period for the establishment of title is, therefore, different than for the establishment of Aboriginal rights to engage in specific activities... This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.

On the other hand, in the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law...Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact... Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture...  


80. *Ibid.*, para. 145, 146 (emphasis in original). The last point made by Chief Justice Lamer regarding the difficulty of arriving at precisely when first contact occurred obviously is as significant in an Aboriginal rights case as it is in an Aboriginal title case.
Delgamuukw then goes on to discuss what follows from a finding of Aboriginal title. This is obviously a very significant issue. In the case at bar, much of the land in question had been alienated by the Crown in one form or another and was being used by non-Aboriginal people for a wide variety of activities. If assertion of Aboriginal title means that the rights to the land now revert to the original owners then clearly, this would have a dramatic impact on land-holding in the affected area. In Sparrow, it will be recalled, the Court imported a justificatory standard to be used in cases where a breach of s. 35 (1) was successfully made out. As discussed earlier, this standard bears a great resemblance to the Oakes test, used to justify government infringements of Charter rights.

The Court made it clear, that in its opinion, there was nothing inherently improper with any of the uses to which the land in question has been put:

The general principles governing justification laid down in Sparrow...operate with respect to infringements of aboriginal title....the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad....In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.81

On the other hand, Aboriginal title would be an extremely empty vessel if virtually any use of Aboriginal lands was justified and if Aboriginal people received no consideration for its use. For this reason, the Court emphasized that Aboriginal participation in the use of their land must be a part of Aboriginal title:

The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action...What is required is that the government demonstrate...“both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest” of the holders of aboriginal title in the land. ...this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive...No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority [as was done in Sparrow]...First, aboriginal title encompasses within it a right to choose to what ends a

81. Ibid, para. 165.
piece of land can be put...This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown’s failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.82

The other aspect of Aboriginal title revolves around compensation for the use of land. Given the fiduciary duty of the Crown to Aboriginal peoples, some compensation would be expected:

...aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well...Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights...In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. ... In the circumstances, it is best that we leave those difficult questions to another day.83

After setting out the nature of Aboriginal title, providing guidance for how proof of such title can be made and discussing issues of justification and compensation, the Chief Justice concluded his decision with a plea that reflected back on the Court’s earlier remarks in Sparrow regarding the advantages of negotiated settlements:84

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was

82. Ibid, paras. 167, 168.
83. Ibid., para. 169.
84. LaForest, in his judgement, echoed the call for negotiated settlements:

“I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.” Ibid., para. 207.
said in *Sparrow*...s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place”. Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) — “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.85

Among advocates for Aboriginal rights, *Delgamuukw* has been hailed in much the same way that *Sparrow* was when it was released.86 Indeed, *Delgamuukw* has many parallels with *Sparrow*. Like *Sparrow*, it does not actually decide the merits of a particular case, but rather sets out the criteria that courts must consider in making such decisions. In doing so, the Court hands to Aboriginal people some better cards to take to the table, particularly around easing the burden of proof of Aboriginal title.

*Delgamuukw* makes the Court’s preference for negotiated settlements even clearer than it was in *Sparrow*. In addition to the admonitions to resolve issues around the table, the Court has, as it did in *Sparrow*, tried to inject enough uncertainty in the process to encourage both sides to negotiate. While apparently making the way easier to recognize Aboriginal title, the Court made it clear that a finding of Aboriginal title would likely not disturb current landholders. On the other hand, a finding of Aboriginal title would have to carry with it some degree of consultation and likely compensation. By leaving these issues in the realm of generality, the Court refused to tip its hand with respect to future decisions.

It is hoped that all the parties concerned in this particular case, the First Nations and the provincial and federal governments will take the opportunity provided by the Court to re-enter into negotiations and to see matters through to a satisfactory resolution. Governments can certainly use the decision to explain to their constituents why negotiations must be restarted and why a negotiated settlement is preferable to the vagaries of a Court-imposed resolution. On a broader level, *Delgamuukw* might well set the stage for the resolution of other cases where Aboriginal title is at stake.

Should negotiations fail however, one would be hard-pressed to state with any confidence what type of Court-ordered resolution might be imposed. *Van der Peet* did not appear to be the logical next step following *Sparrow* — who knows what might emerge in *Delgamuukw II*. The *Van der Peet* experience would suggest that betting on a clear victory for Aboriginal peoples would be a long-shot.


86. In reaction to the judgement Phil Fontaine, Grand Chief of the Assembly of First Nations said:“What it does is send a clear message to all of Canada” *New York Times*, (12 December, 1997). Joe Mathias, Chief of the Squamish First Nation in British Columbia said: “The Supreme Court of Canada has restored a measure of faith in aboriginal people in British Columbia in the legal system” *Vancouver Sun*, (12 December, 1997).